



Commonwealth of Massachusetts

State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-92-34*

FACTS:

You are a Selectman in New Ashford (the Town). You are also an employee of the Brodie Mountain Ski Area (Brodie), a corporation principally owned by your father.

The state statutes governing municipal property taxation provide in part that the local assessors are to classify real property by its use, including “residential” and “commercial” property. G.L. c. 59, §2A. The Selectmen may then annually adopt a “residential factor,” which has the effect of applying a higher tax rate to commercial property than to residential property. G.L. c. 40, §56.

Your immediate family, and corporations it owns including Brodie, own “commercial” property in the Town that amounts to 28 percent of the Town’s total valuation. The next largest commercial owner owns about 5 percent. The Town’s 1990 federal census population is 192. Nineteen of these Town residents own commercial property in the Town in their individual names. Other commercial property in the Town is owned by a closely held family corporation, in which at least one shareholder is a Town resident. Therefore, in addition to your immediate family, at least 20 Town residents, constituting more than 10 percent of the Town’s population, have a personal ownership interest in commercial property in the Town.^{1/}

For the past several years, the Town’s Selectmen have voted to adopt a residential factor that establishes a higher tax rate for commercial than for residential property. You expect the same issue to come before the Selectmen in future years.

QUESTION:

May you participate as a Selectman in the decision to adopt this residential factor?

ANSWER:

Yes.

DISCUSSION:

Section 19(a) of G.L. c. 268A generally prohibits a municipal employee from participating in a particular matter in which he knows that (among others) he, his immediate family, or a business organization that employs him, has a financial interest. As a Selectman, you are a “municipal employee” for the purpose of the conflict law. *Id.* §1(g). Brodie, as a major commercial property owner in the Town, has an obvious financial interest in the Selectmen’s decision to adopt a residential factor. Your father, a member of your “immediate family” (*see id.* §1[e]), is Brodie’s principal owner. In addition, you are a Brodie employee. Therefore, §19 will prohibit you from participating in the residential factor decision, unless this decision **either** is not a “particular matter” **or** is exempt under §19(b)(3) because it is a particular matter [that] involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

These two legal issues are closely related, as the history of the §19(b)(3) exemption shows. This exemption was not a part of §19 when the conflict law was first enacted. St. 1962, c. 779, §1. Rather, the exemption’s language is taken nearly verbatim from a contemporaneous commentary on the newly enacted 1962 statute’s

definition of “particular matter.”^{2/} Braucher, *Conflict of Interest in Massachusetts*, in *Perspectives of Law, Essays for Austin Wakeman Scott* 26-27 (1964). Because of its importance to the present discussion, we quote the relevant passage in full (omitting footnotes), emphasizing the words that inspired the §19(b)(3) exemption:

Determinations of General Policy. The statutory definition of “particular matter” literally covers a legislative “proceeding” or “determination” other than “enactment of general legislation by the general court.” But the word “particular,” the exclusion of “general legislation” and the exclusion of elected town meeting members from the definition of “municipal employee” indicate an intention to exclude some determinations of general policy. Such an exclusion, together with some limitation on the literal meaning of “financial interest,” seems essential if the statute is to be workable. Municipal officials and employees are commonly residents and taxpayers of the city or town. As residents and often as employees they have a financial interest in the expansion of municipal services; as taxpayers they have a financial interest in reducing municipal expenditures. Municipal policy making is largely concerned with the resolution of this inherent conflict of interest; a requirement that all municipal employees abstain from participation in any matter where such financial interests are at stake would simply destroy municipal government.

It would seem, therefore, that a municipal employee should not be held to have a “financial interest” in a “particular matter” where the proceeding or determination involves a matter of general policy and his interest and the interests of his family and business associates are shared by a substantial segment of the public. As under the rules of the general court, the disqualifying interest should be a “private right, distinct from the public interest,” and the connection should be more direct than that of the interests of municipal employees, residents or taxpayers in general. Examples of the application of the suggested standard [include] a general classification of municipal employees as “special” or not, using appropriate standards, should not be regarded as a particular matter; salary and pension payments by private employers do not necessarily relate to any particular matter. Other examples come readily to mind: recommendation of a comprehensive zoning by-law by a planning board, approval of the annual budget by a finance committee, recommendation of a new school building by a superintendent or a school committee. But the boundaries are not sharply drawn; judicial decisions indicate that the line between “legislative” and “quasi-judicial” is sometimes blurred.

Professor Robert Braucher, who wrote these words, had been a member of the special legislative commission that proposed the 1962 statute, and of that commission’s three-member drafting subcommittee. Braucher, *supra*, at 6. Later, as an associate justice of the Supreme Judicial Court, he had occasion to return to this subject in *Graham v. McGrail*, 370 Mass. 133 (1976).^{3/} There, the court decided that §19 prohibited School Committee members from participating in a budget item in which their immediate family members (as school employees) had a financial interest, but did not then prohibit these members from considering the budget as a whole. *See EC-COI-87-25* (discussing this specific holding). Justice Braucher’s opinion for a unanimous court rehearsed much of what Professor Braucher had written twelve years earlier about the terms “financial interest” and “particular matter.” 370 Mass. at 138-40.

When this Commission later proposed the present §19(b)(3) language (as one of many recommended amendments to G.L. cc. 268A & 268B, *see* H. 1235, §15 [1982]), however, this language was cast as an exemption from §19, for reasons that are unclear.^{4/} The enactment of this proposed provision unchanged, in St. 1982, c. 612, §11, may imply that the Legislature regards at least some matters of general policy as “particular matters” (hence the need for an exemption), thus taking a more expansive view of the term “particular matter” than Professor Braucher or the *Graham* opinion. *Compare Graham*, 370 Mass. at 139 (dictum stating that “particular matter” may refer “primarily to judicial or quasi-judicial proceedings rather than to legislative or **managerial** action” [emphasis added]) *with Sciuto v. City of Lawrence*, 389 Mass. 939, 947-48 (1983) (official’s promotion of his brother was participation in “particular matter” violating §19, citing *Graham*).

Assuming that the Selectmen’s decision here is a particular matter, we nonetheless conclude, in light of the legislative history and purpose just discussed, that your participation comes within this §19(b)(3) exemption. This exemption requires both (1) that the Selectmen’s decision involve “a determination of general policy,” and (2) that your and your family’s interests be “shared with a substantial segment of the [Town’s] population.”

The decision to adopt a residential factor, although it has been described as “primarily executive” rather than

legislative in nature,^{5/} nonetheless involves a determination of general policy. Here, the policy is one in which every taxpayer of the Town has an interest.

The exemption's second requirement seems intended to prevent its application to a matter that, although couched in terms of general policy, in fact affects the financial interests of only relatively few town residents. *See Belin v. Secretary of the Commonwealth*, 362 Mass. 530 (1972) (purportedly general legislation that in fact affected only one city was "special" law for purpose of state constitution's Home Rule Amendment); *EC-COI-89-8* (applying this principle to define "general legislation" for purpose of G.L. c. 268A, §1[k]). We think the relevant classification must be one of kind rather than degree; here, it is the distinction suggested by the property tax classification statutes themselves — whether a Town resident has an ownership interest in "commercial" property. The present facts indicate that more than 10 percent of all Town residents share such an interest. At least in the present circumstances,^{6/} this represents a "substantial segment of the [Town's] population."^{7/}

It follows that the §19(b)(3) exemption applies here.^{8/} Therefore, you may participate fully in the Selectmen's discussion of and vote on the decision to adopt a property tax residential factor.

DATE AUTHORIZED: November 5, 1992

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

^{1/}The Town's principal assessor, as you authorized, provided the facts in this paragraph.

^{2/}"Particular matter" was then defined as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court." G.L. c. 268A, §1(k), as appearing in St. 1962, c. 779, §1. A further explicit exclusion of local petitions for special laws was added by St. 1982, c. 612, §1.

^{3/}Because of his unique tri-partite role in the history of §19, the Supreme Judicial Court itself later explicitly recognized the special weight that Justice Braucher's views should be accorded in this area. *Sciuto v. City of Lawrence*, 389 Mass. 939, 948-49 (1983).

^{4/}The bill's "section-by-section summary," distributed by the Commission staff to both houses of the Legislature while each was considering the bill, described this provision merely as intended "to reflect the finding in *Graham v. McGrail*, 370 Mass. 133, 139 (1976)." Similarly, the Commission's official summary of the newly enacted statute, in a January 1983 special edition of our *Bulletin*, describes this provision as "in effect, a codification of existing case law. *See Graham v. McGrail*, 370 Mass. 133, 139 (1976)."

^{5/}*Andrade v. City Council of Gloucester*, 406 Mass. 337, 340-41 (1989) (such a decision held not subject to municipal referendum, under charter allowing referenda only on quasi-legislative "measures").

^{6/}*Cf. Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976) (in context, \$50 was "substantial value" for purpose of G.L. c. 268A, §3).

^{7/}"Population," as used in the General Laws, means the number of residents counted in the most recent census (here, the 1990 federal census). G.L. c. 4, §7(4l).

^{8/}Because §19(b)(3) exempts your "activity" here from §19, §23(d) also exempts it from §23.